No. 88-940

FILED
FEB 21 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

BANK ONE, STEVENS POINT, NA,
Petitioner,

v.

UNITED STATES DEPARTMENT OF COMMERCE, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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REPLY IN SUPPORT OF PETITION FOR CERTIORARI

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1. The government's response does not dispute that the decisions of the circuits on when the government bears responsibility for commercial actions of its officials are all over the lot. See Br. Opp. 9. It attempts to brush the conflicts aside by inaccurately asserting that "[p]etitioner's objection, however, is not to any error in the legal standard adopted by the court here." Br. Opp. 7. That assertion, of course, is nonsense. Petitioner objects to, and seeks certiorari to review, the Seventh Circuit's holding that only by meeting all the traditional elements of an estoppel can the government, after inducing a loan, be held to honor its own guaranty. *Compare* Pet. Cert. 17-23 *with* Pet. Cert. App. A. 11.

2. Even if all the elements of common-law estoppel did have to be shown, the District Court found they were here. The bank's reliance on the government's actions was not conjectural: it was central. The bank had already declined to make this very loan, until the government stepped in to guarantee it. As the District Court explained,

> "There is no question that this is another government loan that should never have been made. . . . Citizens [Bank], as well as all other financial institutions, determined that Weber should not receive the requested funds. The government, however, became involved, and the loan which should never have been made was granted." Pet. Cert. App. A. 19-20.

See also *id.* A. 14, A. 23. The government, it is conceded, acted at all times with complete knowledge of all the facts and full participation in every circumstance of the transaction.[1] It was four years after the borrower's default—and after initially arranging to pay the guaranty, see Pet. Cert. App. A. 91-92—that the government decided to change course and instead dishonor the guaranty. As the District Court put it, "The [federal] defendants having apparently belatedly recognized their error in business acumen, have now determined that others are to blame." Pet. Cert. App. A. 20.

3. The government seeks to avoid this Court's review by embracing the Seventh Circuit's appellate finding that "there was no reliance by the bank." Br. Opp. 7. But the District Court—the only court empowered to make findings of fact—found specifically that there *was* reliance by

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[1] At trial, the government declined to call a single present or former EDA official to support its position. R. 240. The Bank introduced testimony of twelve present or former EDA employees who had participated in the approval, closing, disbursing servicing and liquidating of the loan, as well as of the EDA regional director and other officials from Washington. R. 188-91, 193-198, 200-201.

the bank—that "the [government] defendants are estopped by their own actions." Pet. Cert. App. A. 19.

For the Court of Appeals to throw out a District Court's fact-findings and, instead of remanding, substitute its own, clearly violates this Court's holding in *Icicle Seafoods, Inc.* v. *Worthington*, 475 U.S. 709 (1986). Faced with the *Icicle Seafoods* rule, the government backs off and says that

> "the court of appeals arguably engaged in commentary unrelated to the issues developed before the district court and unnecessary to the disposition of the case . . . ." Br. Opp. 10.

But what the government thus airily dismisses at page 10 of its brief as mere unnecessary "commentary" is what the government earlier relies on at page 7 as its factual basis for denying certiorari.

4. The Court of Appeals demonstrates an undisguised—perhaps merited—skepticism toward high-risk loan guaranty programs, of which there are dozens.[2] That is not a license, however, when such loans go sour, to reallocate the cost judicially onto the lenders instead of on the government which induced and said it stood behind them. The Court of Appeals created an anomalous legal standard to let the government out of an obligation, and ignored the proper allocation of fact-finding responsibility between it and the District Court. Its holding is far-reaching and is in conflict with decisions of other circuits and of this Court.

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[2] The Court of Appeals opined that "If the bank had been acting as a reasonable and prudent commercial lender, uncushioned by a federal loan guaranty, it would have reevaluated the making of the loan, in light of the collapse of Weber's relatively roseate prospects." Pet. Cert. App. A. 8. But the Bank *did* have a guaranty, as the federal program contemplated. It fully informed the federal guarantor of the borrower's worsened financial condition. Pet. Cert. App. A. 87. The guarantor chose to proceed to guarantee the loan anyway.

CONCLUSION

For the reasons stated here and in the petition, certiorari should be granted.

Respectfully submitted,

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February 21, 1989